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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7436

D.C. Docket No. CR89-00105-B

FILED
U.S. Court of Appeals
Eleventh Circuit
Feb. 26, 1996
Miguel J. Cortez
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAMBERT C. MIMS,

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Alabama

(February 26, 1996)
ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

In 1990, Lambert C. Mims ("Mims"), the former Mayor of Mobile, Alabama, was convicted of two counts of Hobbs Act, 18 U.S.C. § 1951, violations and was sentenced pre-Guidelines[1] to ten years imprisonment, a $10,000 fine, and a $100 special assessment. In an unpublished per curiam opinion, this court affirmed the defendant's convictions in December of 1993. See United States v. McDonald, 12 F.3d 217 (11th Cir. 1993). On January 17, 1995, the United States Supreme Court granted certiorari, vacated this court's judgment, and remanded the case for further consideration in light of Tome v. United States, 513 U.S. ____, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). Upon remand, the parties filed supplemental briefs and we heard oral argument. We find it unnecessary to reach the issue of whether Tome applies in this case, both because the admission of the Godwin diaries was harmless error in any event, and because the diaries were admissible under Federal Rule of Evidence 803(24).

I. ISSUES

On remand, we must address the following issues:

(1) whether the Supreme Court's decision in Tome v. United States, holding that prior consistent statements are admissible only when made before the declarant developed a motive to fabricate, affects Mims's conviction;

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[1] The United States Sentencing Guidelines became effective on November 1, 1987.

(2) assuming arguendo that Tome applies in this case, whether the admission of Godwin's diaries was harmless error;

(3) whether Godwin's diaries were admissible under any other recognized exception to the hearsay rule.

II. PROCEDURAL BACKGROUND

An indictment was filed on December 1, 1988, charging Ellis McDonald ("McDonald"), Charles Shaw ("Shaw"), and Mims with Hobbs Act violations. A thirty-five count superseding indictment was returned on June 30, 1989. The jury convicted Mims of Counts Two and Three.[2] Count Two charged Mims, McDonald, and Shaw with conspiracy to violate the Hobbs Act by obtaining a percentage of ownership in Gerald Godwin's ("Godwin") company, Area Services, Inc. ("Area Services"). Count Three charged Mims with a substantive Hobbs Act violation.[3] On direct appeal, this court

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[2] The indictment also included thirty other counts that were unrelated to Mims. Convicted along with Mims were McDonald, Shaw, and Francis A. Wilkie, Jr. Prior to trial, F. Lee Jackson, Jr. and William E. Cullum entered guilty pleas.

[3] Mims was acquitted of Counts One and Four. Count One charged Mims, McDonald, and F. Lee Jackson, Jr. with a RICO violation under 18 U.S.C. § 1962(c). Count Four charged McDonald, Shaw and Mims with substantive Hobbs Act violations by attempting to force National Heritage Mortgage Corporation to select McDonald's construction company to build a proposed steam

affirmed Mims's conviction.[4] The United States Supreme Court vacated that judgment and remanded the case for further consideration in light of Tome. Following the Supreme Court's remand of this case, Mims filed a motion to reinstate his appeal bond, which the district court denied on February 8, 1995.

II. FACTUAL BACKGROUND

This multiple-defendant criminal prosecution involved charges of extortion in the development of a steam plant operation, fraud and bribery at the Mobile Water Service System, fraud at the Scott Paper Company, tax fraud, and obstruction of justice. Mims's conviction involved the steam plant operation only.

A. Extortion and the steam plant

Due to high oil prices in the late 1970's and early 1980's, interest rose in building a steam-generating plant in Mobile, Alabama, that would be fueled by burning garbage or solid waste. The success of the project depended on two components. First, there had to be a purchaser for the steam with energy usage great enough to make the purchase of steam an economical and practical business proposition. Second, the party building the plant would need commitments from both Mobile County (the "County") and the City of Mobile (the "City") to provide all of

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plant.

[4] We also affirmed the convictions of Mims's codefendants. The Supreme Court denied petitions for certiorari by the codefendants.

their solid wastes for use as fuel at the plant.

In April of 1981, Godwin, the extortion victim, purchased stock in Trash Burning Systems ("TBS"), a company formed for the express purpose of developing, building, and operating the steam plant. TBS negotiated a contract with Degussa Corporation, a subsidiary of a German chemical manufacturer, in which Degussa agreed to purchase the steam if the plant was built. Degussa had sufficient energy usage requirements to warrant purchasing the steam. Thus, in order to succeed Godwin needed to obtain commitments from the City and the County for the garbage.

Mims was the city commissioner who had jurisdiction over City solid waste collection and disposal. In October of 1980, two of Godwin's associates in TBS met with Mims in order to garner his support for the steam plant project and the commitment for the City's garbage. However, Mims refused to work with the two men, because he learned that they were spreading the rumor that Mims was "on the take." The two men were forced to allow Godwin to handle the negotiations and TBS was dissolved.

In the summer of 1983, a Stone Container Corporation ("Stone Container") representative contacted Mims to express the company's interest in locating the steam plant at their factory so Mims sent Shaw to talk with Stone Container. Shaw made representations that he himself had the proper connections and relationships with City officials to facilitate the project. Prior to the submission of the steam plan proposals to the City, Mims suggested to a steam plant equipment

salesperson that Shaw would be the appropriate person to discuss the matter, because Shaw was the person putting together the plant project. During this meeting, Shaw represented to the salesperson that he had a ten-year contract with the City for the garbage and a contract with Stone Container for the purchase of the steam.

In early October of 1983, Mims made a public announcement that the City would accept bids or proposals on waste disposal. TBS having been dissolved, Godwin formed Area Services and submitted his plan for building the steam plant with the Degussa Corporation as the steam purchaser. Mims's co-defendant Shaw[5] became a part owner in CIC, Environmental Contractors ("CIC"), which was formed to bid on operating landfills in the County and was awarded the contract with the County in September of 1983.[6] Shaw submitted two steam plant proposals to the City, one for CIC and another plan under the corporate name of Alabama Energy Recovery, Inc. ("Alabama Energy"). Both proposals involved locating

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[5] Shaw was a real estate and insurance agent who maintained close ties to Mims and Commissioner Gary Greenough and did insurance and appraisal work for the City.

[6] Shaw and the other CIC owners had a dispute over Shaw's duplicitous acquisition of more CIC stock than his partners had agreed, claiming that he needed the stock to give to Mims and County Commissioner Dan Wiley to insure receipt of City and County garbage for the steam plant.

the steam plant at Stone Container;[7] however, Alabama Energy's plan had a lower tipping fee than CIC's.

The City received seven proposals on November 18, 1983. Area Services was the low bidder, but the City's consulting engineer suggested that Alabama Energy's bid was also favorable because it proposed a more central location next to Stone Container, which would cut down on transportation costs. But, an engineer had already informed Mims that Stone Container did not have sufficient energy consumption to make the project economically feasible.[8]

The problem with Stone Container soon became apparent. Frank Brown, representing McDonald's company, Campbell Piping Contractors, Inc., Shaw, and others met with officials at Stone Container on November 30, 1983, during which they informed Stone Container that the City had unofficially selected Shaw to conduct the steam plant project, that McDonald would build the plant, and that they needed more information from Stone Container to proceed. Stone Container revealed that the steam plant would not be economically

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[7] Stone Container never entered into a contract with Shaw, but did furnish him with two letters of intent for both CIC and Alabama Energy, although Stone Container did not realize that Shaw was submitting two bids.

[8] Mims notes that there were many people who thought Stone would be a viable steam user; however, there was testimony that Mims was informed of the problems with Stone.

feasible, because the company would pay more for the steam than it currently paid for energy. At this point, Godwin's contract with Degussa became quite attractive.

The crucial moment of the extortion was a December 8, 1983, meeting held at McDonald's office. During that meeting, Godwin was introduced to Shaw. McDonald then informed both Godwin and Shaw that if a steam plant was to be built, he would build it, and Godwin and Shaw could own it. He left it to Godwin and Shaw to work out the details. Godwin and Shaw then left McDonald and met at Shaw's office, where Shaw informed Godwin that if a steam plant was to be built, he would own half of it, saying "half of something is better than all of nothing." R11 at 432-33. Godwin did not agree to give Shaw an interest in his company at this time, but agreed to work something out later.

At this point, Godwin decided to attempt to persuade city officials that Alabama Energy's proposal was not viable. The City granted Alabama Energy an extension to work out a contract with Stone Container, but Shaw never made attempts to further negotiate with Stone Container after the December 8 meeting. McDonald requested that Godwin meet with him on January 7. During this meeting, in which Shaw was present, McDonald informed Godwin that his running from one person to another would have to stop. Following the meeting, Godwin and Shaw met at a restaurant where Shaw demanded to own 40 percent of Area Services for himself and 20 percent for Paul Reitzammer ("Reitzammer"), a man Shaw had brought into CIC. Godwin finally

agreed to this plan.[9] Shaw told Godwin that Alabama Energy would send a letter to the City saying that Stone Container could not purchase the steam. Shaw also formed a new company to replace CIC that involved Godwin, Shaw, and Reitzammer. The County's contract with CIC was voided by a lawsuit, and the County gave the new contract to run the landfill to Shaw's new company.

Shaw told Godwin to meet Shaw and Mims at the Bienville Club for lunch on January 30, 1984. Godwin's diary reflects that the luncheon meeting was on February 2. The government argued at trial that Godwin sometimes made entries on the wrong page in the diary. Mims's appointment book indicated that he gave a speech at the Optimist Club luncheon on February 2, but also indicated that he had a noon meeting with Shaw on January 30. City records reflected that Mims and two guests had lunch at Bienville Club on January 30. Bienville Club records showed no charges to Mims, the City, Godwin, or Shaw on February 2 but did show that the city attorney Rick Stout was at the club on January 30. Godwin recorded in his diary that it was during this lunch that he first met Stout. Godwin testified that Mims asked Shaw if Shaw had his business worked out with Godwin. Both men answered that they had worked out their differences. Mims instructed Shaw to send him a letter stating that a steam plant with Stone Container would not be feasible, and then

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[9] Shaw and Godwin met with several lawyers from January 16 to 20 to work out the details. One of the lawyers refused to continue because Shaw's insinuations that he had influence at city hall.

informed him that the City would go to work with Area Services. Shaw had a letter sent from Alabama Energy to the City on February 1 saying that the company had been unable to form the project with Stone Container. On February 27, 1984, Mims issued a press release stating that the City would work with Area Services on the steam plant project. Mims provided Godwin with a letter of intent on March 2. Ultimately, both the City and the County entered into agreements to provide garbage for the plant. Ironically, due to the drop in oil prices, the steam plant was no longer economically feasible and was never built.

B. Godwin's Diaries

Godwin testified that he regularly kept notes of various projects that he worked on through the years. He would record these notes contemporaneously or shortly after the events and would later transfer the notes into a legal pad, which he considered to be his permanent chronological diary. For the year 1984, Godwin used a desk diary to record his contemporaneous notes and then continued his routine of transferring these notes to the permanent diary. The permanent diary was marked as GEX 27A (the "permanent diary"),[10] and Godwin's miscellaneous scrap papers and the desk diary were marked GEX 27 (the "desk diary").

Godwin used the diaries to refresh his recollection and read directly from them during his direct testimony. The following

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[10] The permanent diary is a photocopy, because Godwin wanted to keep the original, but lost it during his move to Louisiana.

exchange during cross-examination reveals the extent to which the diaries were used and the contention over their admission:

> BY MR. BAXLEY [counsel for defendant McDonald]:
> Q: May it please the Court, before we start, you still have 27 in your hand that we were hollering so and objecting so about yesterday in front of you?
> A: Yes.
> MR. BAXLEY: Can we show what exhibit 27 is to the jury?
> THE COURT: Show it from here?
> MR. BAXLEY: No, I just want to pass it down.
> THE WITNESS: 27A?
> MR. BAXLEY: This is 27A?
> A: Yes.
> MR. BAXLEY: I just want to walk down and show them.
> MS. GRANADE [Assistant United States Attorney]: Judge, if he is going to exhibit it to the jury, I would like to offer it in evidence.
> MR. BURNS [counsel for defendant Shaw]: Objection.
> MR. BAXLEY: I just want to show the jury what he has been looking at.
> MS. GRANADE: I would offer it in evidence.
> THE COURT: All right. Mark it in.
> MR. BURNS: I object to it coming in.
> THE COURT: On what grounds?
> MR. BURNS: It would have to come in as a past recollection recorded which would require this witness to testify that he has no present recollection, but has to

rely upon that document in order to know what happened. Instead, the witness has said he knew what happened and he has looked at this document occasionally to refresh his recollection as to dates. So, it can only come in as past recollection recorded and there is no proper predicate.

MR. BAXLEY: Your Honor, in addition, I think it should be just shown to the jury because this witness has continually, for one day and one morning, read from it. I have asked repeatedly to see what document he is reading from. He has announced that.

THE COURT: He has done that too without objection. I think any objection in that regard is waived and I am going to order ...

MR. HAAS [counsel for defendant Mims]: Judge, may I express myself?

THE COURT: Yes, sir.

MR. HAAS: I hate to disagree with Mr. Baxley, but portions of the document would probably be admissible if the proper predicate was laid. I have seen it and a lot of it is not admissible, has not been alluded to in testimony; and I, therefore, object to the entire thing coming into evidence.

MR. BAXLEY: I am not offering it in evidence. I just want to exhibit it to the jury, to walk up, so they can see what he has been reading from.

THE COURT: Ladies and gentlemen, we have kind of a hybrid

> situation here. I am going to allow Mr. Baxley to show you this document. I am going to mark it as an exhibit for purposes of the record, but not as a government exhibit at this stage. And if the proper predicate is laid, I will consider doing it.

R12 at 636-38. Following this exchange, Baxley conducted a lengthy cross-examination that focused on discovering what happened to the original of the permanent diary and attempting to attack Godwin's credibility by casting doubt on whether he made the diary entries contemporaneously with the recorded events.[11]

Godwin testified on redirect that during his previous testimony he had been unable to recall the dates and contents of the diaries without reading directly from them. Following this testimony, the Government offered the two diaries into evidence in order to rebut defense claims that the permanent diary had been fabricated. Because Baxley suggested that the original diary entries were written after Godwin testified he had made the entries, the government requested that the jury have the diaries in order to compare them. The court reserved ruling but

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[11] The jury discovered through this questioning that the defense had asked to test the original permanent diary to determine if it had been written all at one time and again asked if the original could be produced. The district court denied these requests accepting the government's explanation of the loss.

indicated that if the defendants continued to assert that Godwin fabricated the diaries, then they would be admitted with a cautionary instruction that their admission was for a limited purpose, and the portions about which there had been no testimony would be excised.

During the government's rebuttal case, Godwin's wife testified that Godwin made the entries in the permanent diary and the desk diary in the manner in which he testified that he did. At this point, the government once again offered the diaries into evidence. All counsel objected and, after lengthy argument by all, the court concluded:

> THE COURT: ... I'm now satisfied that I can make a ruling based on all the evidence that I have discerned in this trial as to their revelancy and admissibility.
> MR. HAAS: What can I do about the fact that I have rested and I can't go in to the caustic comments and unfair comments that Godwin might have put in there about Mims?
> THE COURT: Counsel, everybody cross-examined him (Godwin) so thoroughly --
> MR. HAAS: I didn't.
> THE COURT: -- about his testimony, his recollection, about his references in the diary to one thing or another; I mean, he was exhaustively examined and cross-examined about it. So, in the Court's judgment, no prejudice is going to result to any defendant from their admission and, further, although

they may be classically either recorded recollection refreshed or just recorded recollection or prior recollection refreshed, that once Mr. Mims used them to refresh his recollection and once these documents were used in extensive cross-examination and once Mr. Godwin's credibility was attacked by defense bad character witnesses, that it becomes a jury question as to whether those diaries were as well fabricated, as well as Mr. Godwin's testimony.

Mr. Burns just stated that he was lying about this thing from the beginning, so I think it is very probative for this jury's consideration to have those diaries in conjunction with Mr. Godwin's testimony, particularly since both the diaries and Mr. Godwin were examined and cross-examined to the degree that I haven't seen in a long time.

So I'm overruling the objections to 27 and 27-A and allowing them in evidence.

R40 at 9183-84.

III. STANDARD OF REVIEW

This Court reviews *de novo* a case on remand from the Supreme Court in light of a new Supreme Court decision. United States v. M.C.C. of Florida, Inc., 967 F.2d 1559, 1561-62 (11th Cir. 1992). The Supreme Court's vacation of an opinion of this court for further consideration in light of a new Supreme Court decision does not

nullify all prior proceedings. See Id. at 1561-62. Instead, we must reconsider our decision in light of the new authority and are free to adopt any or all of our prior holding we find to be unaffected by Tome. Id. at 1562.

The erroneous admission of evidence is subject to review for harmless error. Fed. R. Crim. Proc. 52(a). In addition, "[t]he doctrine of harmless error does not require reversal of criminal convictions if the error had no substantial influence on the verdict." United States v. Martinez, 700 F.2d 1358 (11th Cir. 1983). We review rulings on the admissibility of evidence for abuse of discretion. Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 655 (11th Cir. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 69, 130 L.Ed.2d 24 (1994).

IV. DISCUSSION

The Supreme Court directed us to further consider our prior decision in United States v. McDonald, 12 F.3d 217 (11th Cir. 1993) in light of its decision in Tome v. United States, 513 U.S. ___, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). In Tome, the Supreme Court rejected the Tenth Circuit's balancing test for admission of prior consistent statements under Federal Rule of Evidence 801(d)(1)(B) holding instead that the rule embodies the common law temporal requirement that to be admissible prior consistent statements must be made prior to the development of the motive to fabricate. Tome, 513 U.S. ___, _, 115 S.Ct. 696, 701-02, 130 L.Ed.2d 574, 582-84. The Court found: "The language of the Rule, in its concentration on rebutting charges of recent fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in

its use of wording which follows the language of the common-law cases, suggests that it was intended to carry over the common-law pre-motive rule." Tome, 513 U.S. ____, ____, 115 S.Ct. 696, 702, 130 L.Ed.2d. 574, 584. We have considered the application of Tome, but find it unnecessary for us to become embroiled in the thorny question of Tome's applicability, because we hold that the admission of the diaries was harmless error in any event and, further, that the diaries would have been admissible under Federal Rule of Evidence 803(24).

A. Harmless Error

Assuming arguendo that Tome is applicable to this case and that the diaries would not be admissible under any other evidence rule, any error would be harmless in light of the remaining evidence against Mims. The remaining evidence revealed a course of conduct involving the use of city hall influence to gain Shaw a percentage of Godwin's company. Mims refused to deal with Godwin's first partners and then made every effort to insure that Shaw would profit from the building of the steam plant. Prior to the submission of the steam plant proposals, Mims sent a steam plant equipment salesman to see Shaw and also sent Shaw to Stone Container, representing that Shaw was the person handling the steam plant operation.

The error in Tome was far more harmful to the defendant than any purported error in this case. Tome was a prosecution for sexual abuse involving a child who had great difficulty testifying. See Tome, 513 U.S. ___, ___, 115 S,Ct. 696, 699-700, 130 L.Ed.2d 574, 579-80. The child's prior consistent statements were introduced by

six witnesses who bolstered the child's weak testimony. Id. Clearly, the prior consistent statements made after the child developed a motive to fabricate were not harmless. See United States v. Tome, 61 F.3d 1446, 1455 (10th Cir. 1995). However, Godwin's diaries are in no way similar to the parade of six witnesses who bolstered the child's testimony in Tome. The jury heard Godwin testify on both direct and cross-examination regarding the diaries. During direct testimony, Godwin read directly from the diaries. Consequently, admitting the diaries does not amount to bolstering weak testimony.

Mims expressed concern that the diaries were used by the government to explain the discrepancy in the date of the meeting at the Bienville Club. Despite the fact that Mims was at a different speaking engagement on February 2--the date Godwin recorded as the meeting date--there was sufficient other evidence to show that the meeting actually took place on January 30. Mims's calendar, as well as the Bienville Club records, shows that he had lunch at the club with two other people on January 30. Godwin recorded that he met County attorney Trout during this meeting, and Trout was not at the Bienville Club on February 2, but was at the club on January 30. Furthermore, the letter that Godwin testified that Mims requested was sent on February 1. There was clearly enough evidence to link Mims to this meeting without regard to the contents of the diaries. The credibility of the testimony of Godwin as opposed to Mims was a question for the jury to weigh. In addition, Mims places great emphasis on the fact that this meeting is the only direct evidence of his involvement. While this may be true, there was an abundance of circumstantial evidence

linking Mims to the extortion scheme, and circumstantial evidence is afforded the same weight as direct evidence.

Mims also expressed concern about the fact that the words "Hobbs Act" were written beside the entry for December 8 in the permanent diary. Although the jury saw this entry, that, in and of itself, is not sufficiently prejudicial to override the other evidence against Mims. During oral argument, counsel for Mims suggested that politicians and bureaucrats should tell people to "get together" for the benefit of a project. However, this "transaction" involved far more than simple encouragement of cooperation. Godwin was well-informed that doing business with Mims and city hall meant giving control of his company to Shaw. After reviewing all of the evidence against Mims, we hold that the admission of the diaries was harmless error.

B. Federal Rule of Evidence 803(24)[12]

The Supreme Court in Tome noted:

> When a party seeks to introduce out-of-court statements that contain strong circumstantial

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[12] The government also argued that the diaries were admissible under Federal Rule of Evidence 612 because Mims used them to refresh his recollection when preparing to testify. Pursuant to Rule 612, the diaries could be submitted to the jury only for the purpose of evaluating the credibility of the witness and not as substantive evidence, as was the case with the Godwin diaries.

> indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available, there is no need to distort the requirements of Rule 801(d)(1)(B). If its requirements are met, Rule 803(24) exists for that eventuality.

Tome, 513 U.S. ____, ____, 115 S.Ct. 696, 705, 130 L.Ed.2d 574, 588. Even assuming that Godwin's diaries were inadmissible under 801(d)(1)(B), they were admissible under the catch-all Rule 803(24).[13]

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[13] Federal Rule of Evidence 803(24) reads as follows:

> (24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless

In order to admit evidence under rule 803(24), this circuit requires the proponent to meet the five conditions of "notice, guarantees of trustworthiness, materiality, probativeness and a meeting of the interests of justice by introducing such evidence." United States v. Scrima, 819 F.2d 996, 1000 (11th Cir. 1987) (citations omitted). Generally, the 803(24) exception is not available when the declarant is available to testify due to the requirement that the statement be "more probative on the point for which it is offered than other evidence that the proponent can procure through reasonable efforts." Fed. R. Evid. 803(24). See United States v. Taylor, 792 F.2d 1019, 1027 (11th Cir. 1986), cert. denied, 481 U.S. 1030, 107 S.Ct. 1958, 95 L.Ed.2d 530 (1987). However, the situation with Godwin's diaries is unique. Godwin was available to testify, but due to the defense claim that the permanent diary was fabricated, the judge found it necessary to admit the diaries to allow the jury to compare them. In this instance, the best evidence was not Godwin's testimony but the diaries themselves.

> the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Even if notice to the defense is insufficient, "[t]his Circuit holds that a failure to comply with the notice requirement is not controlling if defendant is not harmed and 'had a fair opportunity to meet the statements.'" United States v. Parker, 749 F.2d 628, 633 (11th Cir. 1984) (citing United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976)). In the present case, the government decided to offer the diaries into evidence only after Baxley requested that they be published to the jury. The defense had ample opportunity to cross-examine Godwin about the diaries. Mims's trial counsel complained to the district court that he did not have the opportunity to cross-examine Godwin about comments regarding Mims. However, we agree with the district court's conclusion that due to the extent of the cross-examination of Godwin, their admission caused no prejudice to any of the defendants.

Moreover, the purpose of Rule 803(24) is instructive. "Rule 803(24) was designed to encourage the progressive growth and development of federal evidentiary law by giving courts the flexibility to deal with new evidentiary situations which may not be pigeon-holed elsewhere. Yet tight reins must be held to insure that this provision does not emasculate our well developed body of law and the notions underlying our evidentiary rules." United States v. Mathis, 559 F.2d 294, 299 (5th Cir. 1977).[14] Godwin repeatedly read from the

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[14] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

diaries during direct examination, and the defense exhaustively cross-examined him concerning their reliability. Mims's own counsel asked Godwin to use the diaries to refresh his recollection during cross-examination and, when unsuccessful, asked if Godwin might find any other notes at home regarding a certain date. R13 at 1110-11. The defense made the credibility of the diaries and Godwin central to the outcome of the case. Consequently, it would be unfair for Mims to, in effect, reap the benefits of the thorough cross-examination of Godwin concerning the diaries, but not allow the jury to explore the entire situation by seeing the diaries for themselves. Moreover, Mims used the diaries to prepare for his own testimony. Mims's counsel did not object to Baxley's extensive cross-examination of Godwin using the diaries, and even said himself that portions of them were probably admissible.

This case presents a unique situation in which the prior consistent statements are the actual diaries that were composed by the extortion victim, were used extensively throughout trial testimony, and were placed into question by the defense. The district court concluded that their admission would cause no prejudice to any of the defendants. This unusual situation in which recorded diaries were read to the jury, used by both Mims and the declarant to testify, and in which both the declarant and the diaries were thoroughly cross-examined most assuredly is the type of situation contemplated to Rule 803(24). Accordingly, we also hold that the diaries were admissible under Rule 803(24).

IV. CONCLUSION

For the foregoing reasons, we affirm Mims's convictions.

AFFIRMED.

[DO NOT PUBLISH]

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DEC 17 1993
U.S. DIST. JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-7436

D.C. DOCKET NO. CR89-00105-B

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 15 1993
MIGUEL J. CORTEX
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ELLIS L. McDONALD, LAMBERT C. MIMS, CHARLES S. SHAW, FRANCIS A. WILKIE, JR.,

Defendants-Appellants.

NO. 91-7145
D.C. DOCKET NO. CR89-00105-CB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES S. SHAW, FRANCIS A. WILKIE, JR., ELLIS L. McDONALD, LAMBERT C. MIMS,

Defendants-Appellants.

NO. 91-7333
D.C. DOCKET NO. CR89-00105-CB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LAMBERT C. MIMS,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Alabama

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(December 15, 1993)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

I.

This is a complex criminal case involving four defendants and twenty-nine issues raised on appeal. The record demonstrates that the defendants were charged with numerous criminal violations including, among other things, racketeering, extortion, conspiracy to defraud, fraud through the use of the mails, obstruction of justice and various tax charges. The case was tried to a jury in the United States District Court for the Southern District of Alabama. The trial lasted approximately two and a half months. With the exception of defendant Shaw, who was convicted on both of the charges made against him, the remaining defendants were convicted of some charges, but acquitted of others. Each defendant appeals his

conviction. Additionally, defendant McDonald appeals his sentence and the denial of his post-verdict motion.

II.

During the trial the government presented massive amounts of evidence through witnesses and documents that the defendants were involved in an extortion referred to as "The Steam Plant Extortion," fraud and bribery of the Mobile Water Service System, tax fraud, and obstruction of justice. After carefully reviewing the massive record in this case, and after reading the briefs and having the benefit of oral argument, we are persuaded that there is no merit to any of the issues the defendants present in this appeal concerning their convictions. Therefore, the convictions of each defendant are summarily affirmed.

III.

Defendant McDonald argues that, in sentencing[1] him on the four counts[2] subject to a sentencing guidelines sentence, the district court improperly added two levels to the adjusted offense level for obstruction of justice based solely on the fact that McDonald had been indicted for tampering with the jury. In its brief, the government concedes that, pursuant to previous holdings of this court, the district court is required to make findings, based upon a preponderance of the

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[1] Ellis McDonald is the only defendant to appeal his sentence.

[2] Counts One, Twenty-seven, Twenty-eight and Thirty-five.

evidence, and cannot base its findings solely on the allegations contained within an indictment. See United States v. Andrews, 953 F.d 1312 (11th Cir. 1992); United States v. Castalanos, 904 F.2d 1490, 1495 (11th Cir. 1990). Accordingly, we vacate McDonald's sentence and remand his case to the district court for resentencing on Counts One, Twenty-seven, Twenty-eight and Thirty-five.[3]

AFFIRMED in part, VACATED in part and REMANDED for resentencing.

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[3] We also observe from the record that the adjusted offense level used at sentencing was incorrectly determined, by a mistake in the addition, to be twenty-three. The base offense level was determined to be nineteen. Defendant McDonald then received a four level increase for role in the offense and a two level increase for obstruction of justice. These figures result in a total adjusted offense level of twenty-five instead of twenty-three. The district court should correct this error upon remand.

Supreme Court of the United States

No. 93-1805

LAMBERT MIMS,

Petitioner

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed January 17, 1995.

The petition herein for writ of certiorari to the United States Court of Apeals for the Eleventh Circuit is granted.

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court
of the United States
By Francis J. Carson
Chief Deputy

Supreme Court of the United States

No. 93-1805

LAMBERT C. MIMS,

Petitioner

v.

UNITED STATES

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Tome v. United States*, 513 U. S. ____ (1995).

IT IS FURTHER ORDERED that the petitioner Lambert C. Mims recover from the United States Three Hundred Dollars

($300.00) for his costs herein expended.

January 17, 1995

A true copy WILLIAM K. SUTER
Test:
By Francis J. Carson
Chief Deputy

Clek's
costs:
$300.00